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Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

(2)

NO. 84-1212

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF INDIANA,

Petitioner,

vs.

WILLIAM A. MINNICK,

Respondent.

BRIEF IN OPPOSITION TO PETITION OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTION PRESENTED BY PETITIONER

Whether the Court's holding in Edwards v. Arizona concerning initiating custodial interrogation after a suspect has mentioned his desire for representation of counsel must be applied as a "per se" rule or whether a Court may consider from the facts whether the Defendant voluntarily, knowingly, and intelligently waived his right to have counsel present; and, if so, whether the Defendant did so in this instance.

STATEMENT OF CASE

On the afternoon of October 26, 1981, Martha Payne died from a knife being inserted in her back, had facial abrasions on both of her cheeks, contusions on the back and right side of her head, two ligature abrasion marks on her neck and burn marks on the inside of her ankles caused by electrical spark.

Respondent herein, William A. Minnick, eighteen (18) years of age, was convicted of the Murder, Robbery and Rape of Martha Payne. The jury recommended the death penalty and the Trial Court concurred.

Robbery was never established in that a jar full of coins of a value of about eighty dollars ($80.00) was taken at the time of Marth Payne's death, and Mr. Payne, who had returned from California about five (5) days earlier had not seen the jar in the house upon his return. Further, State's witness Dr. John Pless, Forensic Pathologist, testified that any penetration would have been after death. Indiana State Policeman Gary Hood acknowledged that he recognized the marks on her ankle as being burn marks when he first saw the body at the home the evening of October 26, 1981.

In the early morning of October 27, 1981, Greencastle Police Officer, Rodney Cline, misled Minnick, into believing that he was going to the police station to talk about the "bad plates" on his car. At the station Officer Cline read the Miranda Rights to Minnick and advised him that "This is just a formality we go through when we ask questions"; told him he didn't need an attorney and ask Minnick sign the Waiver. Minnick still believing that he weas at the police station because of his car signed the waiver. After signing, Minnick was only then told by Officer Cline that he was there because they believed that he had killed Martha Payne.

Prosecutor Brewer, Officer Jack Hanlon, Indiana State Police, as well as Minnick's parents came into the room where Brewer made a tape recording of part of the exchange between Minnick and the officers which took place approximately 5:30 a.m. that morning (and not 7:30 a.m. as contended by Petitioner). See Appendix.

Later, at approximately 11:00 a.m. on the same day Officer Jack Hanlon, advised Minnick of his rights, stating that this advisement was only for the purpose of taking a "trace metal" test and Minnick waived his right to an attorney for such test, which came out negative.

At approximately 11:00 to 11:10 a.m. that day Officer Hanlon placed Minnick under arrest for the murder of Martha Payne without any evidence. At noon that day Officer Jack Hanlon had lunch with State Police Officer James Smith, Putnam Deputy Sheriff Jim Hendricks and State Police Officer Richard Rice. During such time, Officers Hendricks and Smith advised Officer Hanlong that they were going to the Putnam County Jail that afternoon to question Minnick about the Murder of Martha Payne. Officer Hanlon failed to advise these officers that he had been present earlier that morning at the interrogation and heard Minnick state that he wanted an attorney.

At 3:00 that afternoon a probable cause hearing was conducted in the Putnam Circuit Court, Greencastle, Indiana, without Minnick being present, at which hearing Officer Hanlon appeared as a witness. Officer Hanlon testified as to matters allegedly stated by Minnick, on which the Court found Probable Cause, but according to Officers Smith and Hendrick, Minnick did not make such statements until approximately 4:00 p.m. that day, an hour later than the probable cause hearing.

At approximately 3:05 p.m. that afternoon, Officer Hendricks went upstairs to Minnick's cell and asked him twice if he wanted to talk; however, Minnick contends that Hendricks "told" him that he had to go down stairs to talk. Downstairs in the interrogation room, Smith read the Miranda Rights to Minnick. Officer Hendrick, who was also present, admitted that he understood that his job is to inform persons being questioned of their rights, but failed to acknowledge whether he should find whether such person understands their rights. Officer Smith, who didn't read or offer the "waiver" to Minnick at such time stated that "I didn't know the acknowledgment meant that he understood it (rights)."

Within five (5) minutes of coming into the room Minnick, received a coke and does not remember anything clearly thereafter until approximately 11:00 that night. Both Officers Smith and Hendricks stated that they were the only ones in this room with Minnick and when asked whether he had a coke to drink at such time replied - Smith: "Not that I Know of." Hendricks: "didn't remember". A woman was seen coming from the room carrying something in her hands.

That there was a initial period of 15 to 20 minutes after Minnick entered the interrogation room until Officer Smith turned the tape recorder on. There is a period of approximately 38 minutes of recording where Minnick is being questioned, and at the end of such segiment Minnick asked for the recorder to be turned off. Thereafter, there is approximately 20 minutes where the recorder is off and Minnick is allegedly confessing. Concerning this 20 minute (off tape) time period of the "confession" there are at least twelve (12) major discripancies between the testimony of Officer Smith and Hendricks. Thereafter, the recorder was turned on again for approximately 27 minutes where Minnick is answering questions of Officers Smith and Hendricks, instead of a narrative statement.

On October 27, 1981, Pat McAulliffe, Med Tech for the Indiana State Farm, arrived at the Putnam County Jail at the request of Sheriff Baugh to check an inmate named "Minnick" for drugs. He arrived there at 4:10 p.m. about five (5) minutes into the time period Officer's Smith and Hendricks testified that Minnick was giving Smith and Hendricks, the person identified as "Minnick" and Officer Hanlon were in the room, and that he immediately took Minnick upstairs to a cell for an examination. Neither officer had previously mentioned that Pat McAulliffe had taken Minnick from the cell, but had both testified that they were in the room alone with Minnick from about 3:05 p.m. to approximately 5:00 p.m.

After Respondent's conviction, he properly raised the issue of admission of the "confession" and upon his Motion to Correct Errors being denied, appealed this cause to the Indiana Supreme Court.

Respondent's conviction was reversed on September 7, 1984. The Supreme Court of Indiana held: that Respondent was in custody and while in custody he asserted his right to counsel; and that later the police initiated further questioning without Respondent taking any action himself to initiate such questioning.

Petitioner filed it's Petition For Rehearing arguing that (1) the Indiana Supreme Court made a mistake on the time that Respondent requested an attorney (11:00 a.m. instead as the record shows 5:30 a.m.); (2) in finding that the police "initated" an interrogation of Respondent at 3:05 p.m. on the 27th day of October, 1981, and (3) in finding that the "per se" rule of Edwards should apply.

The Indiana Supreme Court denied Petitioner's Petition for Rehearing, and Petitioner, on the 25th day of January, 1985, filed it's PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

THE DECISION IS OBVIOUSLY CORRECT AND INVOLVES NO CONFLICT OF OPINION OR OTHER BASIS FOR REVIEW BY THIS COURT

The Petitioner's contention that the Indiana Supreme Court incorrectly held that it must apply Edwards v. Arizona 451 U.S. 447, 101 Sup. Ct. 1880, 68 L.Ed.2d. 378 (1981) as a "per se" rule and did not consider evidence that the interrogation of William Minnick began in a manner which showed that Minnick voluntarily, intelligently, and knowingly waived his right against self-incrimination and representation of counsel. Petitioner also alleges that the Court incorrectly held that Minnick's initial request for Counsel was indeed a clear request to the police to deal with him only through counsel.

Petitioner contends that the Indiana Supreme Court applied a "per se" rule. A brief survey of the Opinion of Chief Justice Givan clearly shows that said rule was applied regarding the standard established in Edwards to the analogous facts in this case. Minnick v. State (1984) 467 N.E.2d 754

The Indiana Supreme Court clearly found that the facts in the Minnick case were analogous to Edwards v. Arizona, Supra, and on that basis correctly held that Minnick had requested Counsel during initial questioning and therefore any statement made by Minnick during police initiated interrogation was inadmissable evidence.

Petitioner's reasons for requesting a Writ of Certiorari upon close evaluation appear to support the ruling of the Indiana Supreme Court. Petitioner cites Wyrick v. Fields, ____ U.S. ____, 103 S.Ct. 394, 74 L.Ed.2d. 214 (1982) in which the Defendant requested a polygraph examination thereby waiving his right to have counsel present during the interrogation which has no bearing on this Petition. No where in the record does Minnick request a polygraph examination or further interrogation with the police.

In Wyrick this Court restated the requirement designed to protect an accused in police custody from being badgered by police officers "..to be that before a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the suspect himself initiated dialogue with the authorities." This Court later reaffirmed this requirement in Oregon v. Bradshaw ____ U.S. ____, 103 S.Ct. 2830 (1983).

Petitioner goes to great lengths in urging this Court not to accept a two-part inquiry or "per se" rule based on Edwards and suggests that since the rules relating to the uses of confessions are essentially "exclusionary rules" attempts to comingle Fifth and Sixth and Fourteenth Amendment rights with Fourth Amendment rights by citing United States v. Leon ____ U.S. _____, 104 S.Ct. 3405, _____ L.Ed.2d. _____ (1984) which involved search and seizure and Fourth Amendment rights, and is not germane to the issues before this Court.

Petitioner's assertion that the Indiana Supreme Court did not consider the clarity or ambiguity of Minnick's request for counsel is unfounded. Respondent submits that the statement "Can I get my lawyer then," requires very little deliberation if any, as to clarity or ambiguity. The first law of identity in Logic states: "That a thing is what it is." This law when applied to the statement, "Can I get my lawyer then." clearly implies that a lawyer is a lawyer. Moreover, Minnick's second request "I'd rather have an attorney." is so clearly a request for counsel that the assertion that the Indiana Supreme Court did not consider the clarity or ambiguity of such a request deserves no comment.

Petitioner cites Smith v. Illinois ____ U.S. ____, 105 S.Ct. 490, 83 L.Ed.2d. 488 (1984) in support of its contention that the Indiana Supreme Court did not consider the clarity or ambiguity of Minnick's request for counsel.

This Court in granting certiorari in Smith reversed: holding that the accuseds' initial request for counsel when he stated "Uh yeah. I'd like to do that." was not ambiguous so that officers should have ended questioning at that point, and that Smith's post-request responses to further interrogation could not be used to cast doubt on the clarity of his initial request for counsel.

This Court in Smith stated: An accused in custody, having expressed his desire to deal only with the police only through counsel, is not subject to further interrogation by the police until counsel has been made available to him, unless he validly waives his earlier request for assistance of counsel Edwards v. Arizona, Supra at 1885 by initiating further communications, exchanges, or conversations with the police.

This "rigid" prophylactic rule embodies two distinct inquiries. Fare v. Michael C., 442 U.S. 707, 719, 99 S.Ct. 2560, 2569, 61 L.Ed.2d. 197 (1979) First Courts must determine whether the accused actually invoked his right to counsel Edwards v. Arizona, Supra at 1984-1885 whether accused "...expressed his desire for, or clearly ascertained his right to the assistance of counsel." Miranda vs. Arizona 384 U.S. at 444-445, 86 S.Ct. at 1612 (1966), whether accused "...indicated in any manner at any stage of the process that he wished to consult with an attorney before speaking"; secondly, if the accused invoked his right to counsel Courts may admit his response to further questioning only on a finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. Edwards v. Arizona, Supra

Even if an accused has indicated a tentative desire while he was being informed of his rights this is entirely consistent with applicable language in Miranda v. Arizona, Supra.

The importance of keeping the two inquiries distinct is manifest. Edwards v. Arizona set forth a "bright line rule" that all questioning must cease after an accused requests counsel. Solem v. Stumes ____ U.S. ____, 104 S.Ct. 1338, 79 L.Ed.2d. 579 (1984) Without such a rule the authorities could shuttle an accused from one interrogator to another in the hopes he might incriminate himself despite his earlier request for counsel.

The conflict among Court's is addressed to the relevance of alleged ambiguities or equivocations that either (1) precede an accused proported request for counsel, or (2) are part of the request itself. Smith v. Illinois 105 S.Ct. 490 (1984) at 493.

Unlike the Smith case there were no ambiguities in Minnick's request for counsel.

Mr. Rogers: Well Jack, do we have to have an attorney or what do you think?

Mr. Hanlon: Well, that entirely up to you.

Mr. Minnick: I'd rather have an attorney.

Mr. Brewer: Huh?

Mr. Minnick: I'd rather have an attorney.

(et.al. see Appendix)

Petitioners contention that Officer Hendricks was acting in good faith when he went to Minnick's cell and asked him if he wanted to go downstairs and talk to the officers to which Minnick did not respond and when Hendricks repeated the question Minnick answered "Yes". Hendricks maintained that he was unaware that Minnick had requested counsel. The record shows that both Officer Hendricks and Indiana State Policeman Smith who participated in the taped interrogation of Minnick had lunch with Sgt. Hanlon and discussed with Hanlon that they were going to interrogate Minnick that afternoon and that Sgt. Hanlon failed to inform them that Minnick had requested counsel. All this occurred only three (3) hours before Hendricks went to Minnick's cell. The record further shows that the Miranda rights which Officer Hendricks read to Minnick were not part of the taped statement.

Petitioners contention that the Indiana Supreme Court did not consider evidence that the interrogation session began in a manner which showed that the Defendant voluntarily, intelligently, and knowingly waived his right against self incrimination and representation by counsel is without merit. As Justice Powell in a concurring opinion in Edwards stated "...But few cases will be as clear as this..." Respondent contends this case is analogous to Edwards and is one of the few cases Justice Powell addressed himself to.

Minnick testified that Officer Hendricks told him he didn't need an attorney and that if his story checked out he could go home. Applying both the Edwards v. Arizona, Supra and the Johnson v. Zerbst 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d. 146 (1938) standard of "totality of the circumstances" the record clearly shows that Minnick's Fifth, Sixth and Fourteenth Constitutional Amendment rights were violated. The Indiana Supreme Court in applying the "totality of the circumstances" mandated in Edwards v. Arizona, Supra, found that Officer Hendricks initiated the conversation with Minnick and found from the "totality of the circumstances" that there was no voluntary waiver of Respondent's earlier request for counsel.

OTHER ALTERNATIVE GROUNDS TO SUPPORT THE JUDGMENT OF THE INDIANA SUPREME COURT.

Without the incriminating taped statement there was insufficient evidence to find Respondent guilty beyond a reasonable doubt. Minnick's statement did not fit the physical facts of the crime. There were over twenty (20) major discrepancies between the facts of the inadmissable statement and the real facts presented at Trial.

Minnick's statement was consistant only with the facts known to the police officers at the time of the interrogation. The information which was used to interrogate Minnick had already been released to the press. Minnick's statement was only reflective of the facts known to his interrogators. This is reflected in the manner of the leading questions in the taped statement wherein the officers utilized the information known to them at the time in directing their questions to Minnick, to achieve their preconceived version of what they thought had occurred. At no time was Respondent asked to sign a transcript of the taped statement. The admissability of the taped statement was objected to at Trial because of the manner in which it was taken. The Miranda rights which Officer Hendricks said he read to Respondent were not recorded. The tape was turned on and off at will by the officers, the volume changed dramatically, and at one point there was a phone call which one of the officers answered. In short the taped statement was not one continuous tape recording without interruptions but was divided into four (4) phases. The interrogating officers had their hands on the on and off switch.

CONCLUSION

Respondent contends that the Indiana Supreme Court in holding that the incriminating statement was inadmissable in violation of Edwards was consistant with the analysis of the cases cited above. Therefore, the Petition for Certiorari should be denied.

WOODROW S. NASSER
Attorney for Respondent

APPENDIX

the witnesses. Conflicts in such testimony do not require suppression of the evidence. The matter of weighing and evaluating such evidence is for the jury. *Hazzard v. State*, (1980) Ind., 413 N.E.2d 895; *Grimes v. State*, (1980) Ind., 412 N.E.2d 75; *Johnson v. State*, (1977) 265 Ind. 689, 359 N.E.2d 525. We therefore hold the trial court did not err in this respect.

Appellant claims the trial court erred in allowing Lee Cummins, the son of the victim, to testify as to the reason for the absence of his mother from the trial, and the fact that her house was for sale. The witness testified that his mother was not at the trial because she had broken her arm in an incident unrelated to the robbery.

[10-12] Appellant objected on the ground that such information was irrelevant. Evidence is relevant if it is material to an issue in the case, or if it logically tends to prove or disprove some issue of fact. The trial court is accorded wide latitude in ruling on the relevancy of evidence. *See Armstrong v. State*, (1982) Ind., 429 N.E.2d 647; *Chittenden v. State*, (1982) Ind., 436 N.E.2d 86. Even if the offered evidence is only marginally relevant, it is within the sound discretion of the court to determine the admissibility of the evidence. *Marchand v. State*, (1982) Ind.App., 435 N.E.2d 284. It was entirely proper for the State, through the witness, to explain the absence of the prosecuting witness from the trial. The reason for her absence could in no way jeopardize appellant as it was shown that it had nothing to do with the instant crime.

[13] As to the testimony that the victim was selling her house, such information was relevant to show that she had, in fact, been placed in fear by appellant and Tyler, and that that fear was continuing. Even if we would assume, for the sake of argument, that such information was not germane to the issues of the case, it was of a *de minimis* nature. Admission of evidence is harmless when the conviction is supported by other independent evidence of guilt. *Howell v. State*, (1980) Ind., 413 N.E.2d 225.

[14] In the light of the evidence presented in this case, we hold that any possible error, by reason of the admission of the above evidence, was harmless.

This case is remanded to the trial court for correction of the sentencing as consistent with this opinion. The trial court is in all other things affirmed.

All Justices concur.

William A. MINNICK, Appellant,

v.

STATE of Indiana, Appellee.

No. 1282S467.

Supreme Court of Indiana.

Sept. 7, 1984.

Defendant was convicted in the Clay Circuit Court, Ernest Yelton, J., of murder, and he appealed. The Supreme Court, Givan, C.J., held that statement made by defendant during second interrogation which police had initiated after initial questioning during which defendant had requested an attorney was inadmissible in prosecution for murder.

Remanded for new trial.

Criminal Law ⇐412.2(4)

Statement made by defendant during second interrogation which police had initiated after initial questioning during which defendant had requested an attorney was inadmissible in prosecution for murder.

Woodrow S. Nasser, Terre Haute, for appellant.

Linley E. Pearson, Atty. Gen., Joseph N. Stevenson, Deputy Atty. Gen., Indianapolis, for appellee.

GIVAN, Chief Justice.

Appellant was convicted of Murder by a jury. The jury found appellant had committed the aggravated acts of robbery and rape in conjunction with the murder. The court sentenced appellant to death.

The facts are: Martha Payne was killed during the late afternoon of October 26, 1981. Based on their investigation, the police went to the home of appellant at 4:45 A.M. on the twenty-seventh. The police asked appellant to accompany them to the station to answer questions. Appellant voluntarily complied. Appellant was provided the standard *Miranda* warnings and signed a waiver of those rights. Appellant orally indicated he did not wish the assistance of counsel. He indicated to the police he had been to the victim's home that day, but he did not admit any role in the murder. At approximately 7:00 A.M., on the twenty-seventh, the following discussion was conducted between appellant, his stepfather and mother Mr. and Mrs. Rogers, State Police Officer Hanlon, Greencastle Police Officer Cline and the Putnam County Prosecutor Delbert Brewer.

MR. HANLON: We're going to get a, a warrant, (inaudible)

MR. MINNICK: A warrant for what?

MR. HANLON: Take some hair from, samples of hair, pieces of hair. Girl was, had a lot of hair under her fingernails.

* * * * * *

MR. HANLON: So we're going to get a warrant, to take some samples of your hair. Okay?

MR. MINNICK: Take some, some of mine?

MR. HANLON: Yeah.

MR. MINNICK: Why?

MR. HANLON: Because she had samples of hair on her. And we want to match them. See if we can match them with what's on her.

MR. MINNICK: What's that for?

MR. HANLON: To see if you were, had a hold of her or she had hold of you.

MR. MINNICK: Then I killed her?

MR. HANLON: I don't know that.

SLIGHT INTERRUPTION IN TAPE

MR. CLINE: —just a routine and everything.

MR. ROGERS: Is he under arrest?

MR. MINNICK: Am I under arrest?

MR. HANLON: We're going to hold you for a little while.

MR. MINNICK: Well, I (sic) rather go home.

MRS. ROGERS: Does he need a lawyer?

MR. HANLON: That's up to you.

MR. MINNICK: I'd rather go home. If you're gonna fingerprint me, fingerprint me. I'd rather go home.

MR. BREWER: You're not leaving. Not yet. Also on, on this, what he's talking about on the warrant, you'll be detained because there may have been rape. We're going to take specimens of various parts, as soon as we have the Judge sign it. Which, if the girl was raped and it matches with you, the semen, etcetera (sic), it will also tell us that.

MR. MINNICK: Huh uh. No. —And then can I, am I allowed to go home?

MR. HANLON: Not right now. (inaudible)

MR. MINNICK: Am I under arrest though? Am I under arrest?

MR. BREWER: You're being held for investigation right now.

MR. MINNICK: Am I, am I allowed to go home though?

MR. HANLON: No, no.

MR. MINNICK: Can I get my lawyer then?

MR. CLINE: You're under custodial arrest at this time.

MR. HANLON SPEAKING SIMULTANEOUSLY WITH MR. CLINE.

MR. HANLON: You have a right to (inaudible)

MR. MINNICK: I'm gonna go home then.

MR. HANLON: Wait a minute. (inaudible)

MR. BREWER: We doing the same thing on some other suspects?

MR. CLINE: That's what I'm saying, you have others too.

MR. HANLON: Yeah.

MR. BREWER: But that will tell us scientifically, you know.

• • • • • • •

MR. ROGERS: Well Jack, do we have to have an attorney or what do you think?

MR. HANLON: Well, that's entirely up to you.

MR. MINNICK: I'd rather have attorney.

MR. BREWER: Huh?

MR. MINNICK: I'd rather have attorney.

MR. BREWER: That won't stop the search warrant.

MR. HANLON: That, that won't stop it.

MR. ROGERS; Well no, but—

MRS. ROGERS: Would it be better then, to just wait what you'ns find and then get an attorney?

MR. BREWER: I can't advise you of that? You have the right to.

MR. HANLON: That's up to you.

This discussion clearly demonstrates two important facts; appellant was in custody and while in custody appellant asserted a request for the assistance of counsel. At that time the police and the prosecutor correctly stopped the interrogation. A search warrant was obtained and the body samples were taken. Appellant was then transported to the Putnam County jail. At 3:00 P.M. on the twenty-seventh, Putnam County Deputy Sheriff Hendrich went to appellant's cell and twice asked appellant if he would like to answer questions. Appellant assented and was taken to be questioned by Hendrich and State Police Officer Smith. The record demonstrates appellant did not request this interrogation, nor did he take any action to initiate the questioning. Appellant gave the police a self-incriminating statement which was introduced into evidence as State's exhibit 63 over the objection of appellant. This was reversible error.

This Court has said:

> "When the right of counsel is asserted during questioning, that process must cease, and a confession procured by interrogators thereafter is per se inadmissible in the absence of a new waiver of counsel evidenced by proof that the suspect initiated the resumption of questioning. *Edwards v. Arizona*, (1981) 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378; *Wall v. State*, (1982) Ind., 441 N.E.2d 682, 683." *Clark v. State*, (1984) Ind., 465 N.E.2d 1090 (Givan, C.J. and Pivarnik, J., dissenting).

The United States Supreme Court in *Edwards* dealt with a situation analogous to the case at bar. After initial questioning, the defendant in *Edwards* requested an attorney. The police then ceased the questioning. However, the police later, after providing a new set of warnings, began to interrogate the defendant. He then produced a confession which was introduced as evidence. In *Edwards* the court held:

> "[T]hat when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards, supra*, 451 U.S. at 484, 101 S.Ct. at 1884, 68 L.Ed.2d at 386.

This cause is remanded to the trial court for a new trial.

All Justices concur.